Supreme Court, U. S.
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No. 74-489

In the Supreme Court of the United States

OCTOBER TERM, 1974

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents assert that this case "presents no novel or significant question of statutory interpretation" because the court of appeals merely ordered that "carefully edited case summaries" be disclosed after *in camera* inspection (Br. in Opp. 5-6). Respondents ignore the important and recurring question presented by the petition —whether exemption 6 protects all personnel files rather than, as the court of appeals held, only those whose disclosure "would constitute a clearly unwarranted invasion of personal privacy." If our interpretation of exemption 6 is correct, the judicial inquiry ends once a file is determined to be a "personnel" or "medical" file,

and there is thus no statutory authority for the *in camera* inspection and "editing" ordered here.[1]

Neither the court of appeals nor respondents cite any authority to support the contention that Congress intended to subject the confidentiality of the millions of government personnel and medical files to the balancing test and editing procedures applied in this case. The more reasonable interpretation is that Congress recognized that personnel and medical files traditionally contain confidential material whose disclosure would violate privacy, and then provided confidential treatment for "similar files" whose disclosure also would have that effect. As the Senate Committee stated: "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records" (S. Rep. No. 813, 89th Cong., 1st Sess., p. 3).[2]

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[1]Respondents cite a recent amendment to the Freedom of Information Act, which "now expressly authorizes *in camera* inspections to determine whether all or parts of any documents sought pursuant to the Act may be exempt (5 U.S.C. §552(a)(4)(B), P.L. 93-1380)" (Br. in Opp. 5, fn.). However, the "segregable records" amendment was simply a statutory recognition of the procedures previously followed by the courts in segregating exempt from non-exempt portions of documents; it was not intended to amend any substantive exemption in the FOI Act (120 Cong. Rec. S9313, S9318 (daily ed., May 30, 1974) (remarks of Senators Kennedy and Hruska)). The 1974 amendments do not amend exemption 6 and if, as we urge, that exemption covers all personnel files, there is no occasion to conduct the *in camera* inspection that the amendments authorize.

[2]Upon signing the Freedom of Information Act into law, President Johnson declared: "Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure" (2 *Weekly Compilation of Presidential Documents* 895, July 11, 1966). Similarly, the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967) pointed out that exemption 6 "is intended to exclude from the disclosure requirements *all personnel and medical files*, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person * * * to whom the information pertains" (p. 36; emphasis added).

2. The court of appeals also held that exemption 2 of the Freedom of Information Act is inapplicable to the case summaries because Honor Code cases "have a substantial potential for public interest outside the Government" (Pet. App. A, p. 8A). The very enactment of the FOI Act, however, indicated that any government record could be the subject of substantial public interest. At the same time, Congress recognized that this public interest was outweighed by the need to protect particular categories of documents. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80. Thus, despite the possible public interest in internal personnel rules and practices, Congress determined to preserve the confidentiality of such records.

The court of appeals, however, held here that material with a "substantial potential for public interest outside the Government" has no protection whatsoever under exemption 2.[3] Nothing in the language or history of exemption 2 indicates that Congress thus intended to qualify the explicit statutory provision that protects documents concerning "internal personnel rules and practices."

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[3]A district court recently adopted the same "substantial potential for public interest outside the Government" interpretation of exemption 2 (*Vaughn* v. *Rosen*, 383 F. Supp. 1049, 1053 (D. D.C.), appeal pending).